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Supreme Court, U.S.
FILED
071438 MAY 19 2008
OFFICE OF THE CLERK

No. 07-1

In The
Supreme Court of the United States

WESTBOUND RECORDS, INC.,

Petitioner,

v.

JUSTIN COMBS PUBLISHING and BAD BOY ENTERTAINMENT, individually and doing business as Bad Boy Records; UNIVERSAL RECORDS, a division of UMG Recordings, Inc.; UMG RECORDINGS, INC.; BAD BOY LLC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This punitive damages case presents questions relating to (i) the implementation of the due process "guideposts" of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), and (ii) the dividing line between "*de novo*" and "clear error" review under *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

1. Whether only punitive damages awards that are "grossly excessive" outliers – that "run wild," *Pacific Mutual Life Insurance Co. v.* Haslip, 499 U.S. 1, 17 (1991) – are barred by substantive due process and, if so, whether this Court should embrace as binding doctrine a presumption of validity for jury awards of less than a 10:1 compensatory-to-punitive-damages ratio, absent a finding of either (i) the lack of malice or (ii) the presence of bias, passion or prejudice, as suggested by the plurality opinion in *TXO Production Corp. v.Alliance Resources Corp.*, 509 U.S. 443, 457 (1993) and by Justice Breyer's concurrence in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586-87 (1996)?

2. Whether, by analogy to *United States v. Bajakajian*, 525 U.S. 321 (1998), upon which this Court relied in adopting the *de novo*

review standard for punitive damage awards, the Court should embrace a "gross" proportionality rather than a "strict" proportionality requirement for evaluating jury awards of punitive damages and for clarifying and shaping the role of appellate courts in applying the *de novo* review standard adopted in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)?

3. Whether jury findings on such components of "reprehensibility" as malice, financial vulnerability, and repeated misconduct are factual determinations subject to "clear error" review or legal conclusions subject to *de novo* review under *Cooper Industries*, *supra*?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Westbound Records, Inc., states that it has no parent company and no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Westbound Records, Inc. ("Westbound") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-45a) is published at 507 F.3d 470 (6th Cir. 2007). The Sixth Circuit's order denying rehearing en banc (Pet. App. 46a-47a) may be found at 2008 U.S. App. LEXIS 3773. The District Court's order denying defendants' motion for mistrial or modification of verdict is not reported but may be found at Pet. App. 48a-56a. The District Court's order on jury verdict is not reported but may be found at Pet. App. 57a-58a.

JURISDICTION

The Court of Appeals denied a timely petition for rehearing and rehearing *en banc* on February 19, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Sixth Circuit set aside a jury determination of punitive damages contrary to the principles established by this Court. The jury awarded a total compensatory judgment of $733,878, to Westbound Records ("Westbound"), which the lower court then reduced by half (to $366,939), due solely to the presence of another plaintiff in the action. Additionally, Westbound was awarded $3.5 million in punitive damages. The ratio between the total compensatory award and the punitive damages was at most 9.5:1, notably within single digits. Further, (a) the Sixth Circuit found that Defendants' conduct was the result of malice or deceit, 507 F.3d at 486; and (b) the Sixth Circuit expressly rejected a claim of jury passion or prejudice, affirming a District Court finding. *Id.* at 478-80. Yet, the Sixth Circuit did not afford the punitive damages award a presumption of validity, but held that due process allows a maximum compensatory/punitive ratio of 2:1.

The Sixth Circuit also did not accord the deference due to a jury's findings of fact. Rather than defer to the jury's findings on financial vulnerability and repeated conduct under clear error, it made its own factual findings after reviewing the factual record *de novo*. The Sixth Circuit improperly second-guessed the factual findings of the jury in violation

of the admonition in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-36 (2001), that review of factual findings must be for clear error.

The Sixth Circuit decision has wide-ranging implications for appellate review of punitive damages awards. While this Court's attempts at providing objective guideposts and harmonizing this difficult area of jurisprudence have been commendable, its efforts have had an unfortunate byproduct -- a disturbing trend towards micro-management of jury verdicts by appellate courts. Rather than address this Court's concern of protecting defendants against "grossly excessive" verdicts, and of establishing objective criteria for appellate review of punitive damages, the Sixth Circuit decision highlights a routinization of appellate review.

First, this area of jurisprudence requires some clarification. To that end, this Court should establish as definitive doctrine a presumption of validity for jury awards of punitive damages within single digit ratios, (i) absent a finding of passion or prejudice on the part of the jury or (ii) absent a finding of lack-of-malice on the part of the tortfeasor. This presumption of validity derives from the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468-69 (1993) (per Stevens, J.) and the concurring opinion of Justice Breyer in *BMW v. Gore* , 517 U.S. 559, 587 (1996).

The Court should use this case as a vehicle to establish that presumption as formal doctrine.

Second, many courts, including the Sixth Circuit in this case, mistakenly apply a simple "proportionality" standard when reviewing a jury award of punitive damages. This Court needs to clarify that the correct standard is "excessively" or "grossly" disproportional. Appellate courts should not disturb jury awards unless they are grossly excessive. *See United States v. Bajakajian*, 525 U.S. 321 (1998). Otherwise the trend of appellate micromanagement of jury verdicts will continue.

Third, this Court also needs to reinforce what it stated in *Cooper Industries,* 532 U.S. at 435-36. A jury's factual determinations regarding components of reprehensibility such as financial vulnerability and repeated conduct may not be set aside by an appellate court unless there was clear error.

The concerns that led to the development of modern substantive due process jurisprudence have been abandoned by the Sixth Circuit and other federal appeals courts reviewing punitive damages awards. In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991), this Court recognized a "concern about punitive damages that 'run wild.'" *Id.* (emphasis supplied). Rather than protecting defendants against the rare instance of "grossly excessive" punitive damages as articulated in *BMW v. Gore, supra*, appeals courts have micromanaged

jury verdicts of punitive damages under more intrusive and subjective standards.

Federal appeals courts have used the "guideposts" developed in *Gore* (and further explicated in *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003)) non-uniformly and in a manner that is inconsistent with the Court's core concern of dealing with outlier cases. Instead of policing against "grossly excessive" outlier punitive damages, the appeals courts have become bogged down in determining, as the Sixth Circuit did in this case, whether a single-digit ratio of punitive to compensatory damages should be invalidated in favor of a marginally lower single-digit ratio.

This trend toward appellate micro-management of punitive damages awarded by juries and affirmed by district courts has been unwittingly facilitated by the rule that appellate review of district court determinations of punitive damages is *de novo.* Despite this Court's holding in *Cooper Industries* requiring deference to jury findings of fact on punitive damages, under a clearly erroneous standard, 532 U.S. at 435-36, appellate courts (such as the Sixth Circuit in this case) have not deferred to jury factfinding but have rather conducted a comprehensive review as if they were a jury.

The Sixth Circuit judgment warrants review because it raises important questions of law regarding the meaning of this Court's punitive damages jurisprudence. It also deepens a circuit

split under the reprehensibility guidepost on the issue of whether a jury can find "repeated conduct" from multiple actions committed by the defendant against the same plaintiff.

1. Background.

As discussed more fully below, this Petition concerns the jury award of punitive damages to Westbound upheld by the United States District Court for the Middle District of Tennessee in a case involving common law copyright infringement and other New York state law claims. The jury awarded Westbound punitive damages that were at most 9.5 times the amount of compensatory damages.[1] Pet. App. 31a. On appeal the Sixth Circuit found the punitive damages award unconstitutional and remanded with instructions to limit the punitive damages to a ratio of 1:1 or 2:1. Pet. App. 35a. By so doing, the Sixth Circuit replaced one single digit ratio of punitive damages with another single digit ratio, while expressly rejecting a claim of jury passion or prejudice and upholding a finding of tortfeasor malice.

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[1] In arriving at the 9.5:1 ratio, the Sixth Circuit used Westbound's share, which the District Court had reduced to half of the jury's total compensatory damage award. That figure was $366,939. Westbound contends that the proper calculation of the ratio of punitive to compensatory damages should be based on the total compensatory award ($733,878), not just the Westbound portion. Such a calculation yields a ratio of 3.5:1. Pet. App. 34a.

As relevant, this controversy arises from the unauthorized use of Westbound's sound recording, and its sister company Bridgeport Music's copyrighted musical composition, "Singing in the Morning" in Defendants' musical composition and sound recording "Ready to Die," which was released on the album Ready to Die.

Under copyright law, the holder of a sound recording, like Westbound, must consent to the use of its material when another party seeks to copy ("sample") the work in a later created song. *Bridgeport Music, Inc. v. Dimension Films,* 410 F.3d 792 (6th Cir. 2005). That is, the form of protection afforded the owner of a sound recording or musical composition is what has been categorized as a "property" rule, which allows the owner to refuse use of its material.[2]

In this case, Defendants well understood that they could not use Bridgeport and Westbound's material without approval. Defendants sought unsuccessfully to use a sample of a song owned by the national figure Jimi Hendrix; when they could not "clear" the Hendrix "sample", Defendants took "no" for an answer –aware of the law and the legal consequences.

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[2] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089, 1105 (1972). This type of legal protection differs from a "liability" rule, in which the law provides damages to a party whose legally protected rights have been abrogated.

Faced with the Hendrix rejection and the perceived need for an alternative, Defendants knowingly and maliciously used Westbound and Bridgeport's material as a substitute without notice or permission – and sought to stonewall, to deny, and then cover up the intentional, malicious breach until Defendants were found liable at trial 12 years after the release of Ready to Die.

Defendants **perceived** Plaintiff to be vulnerable – not likely to detect the breach or, if found out, to have the power or the resources to enforce its claims. Defendants gambled either Plaintiff would never find out, or if it did, Defendants would deny Plaintiff's works were sampled. When Plaintiff discovered the infringement, Defendants ignored all of Plaintiff's calls and letters, forcing litigation. Thereafter, in the course of litigation, the infringers denied there was a sample, mocked Plaintiff and refused to remedy the infringement. Sean Combs (professionally known as "Puff Daddy" or "Diddy"), a world famous record producer, testified unbelievably that he was not qualified to say whether two songs sound alike, while denying the infringement. Perhaps even more audaciously - and, on its own warranting punitive damages - Defendants breached Plaintiff's copyright yet again while these proceedings were still pending by re-releasing the material on another recording. And, to rub salt in the wound, Defendants pugnaciously challenged Plaintiff to stop them.

After persistent denials during pre-trial proceedings, the infringers at trial, admitted to the jury "[they] knew all along" about the unauthorized sample (despite eight years of denial, including multiple denials in answers to written discovery and in the deposition testimony of Sean Combs himself). Defendants contended at trial that the only question was "how much?" That is, defendants knowingly and willfully transformed the protection of Plaintiff's copyright from a "property" rule to a "liability" rule, see note 2, *supra*, forestalling Plaintiff's ability to deny Defendants the use of its copyrighted materials. Having dissembled about what had transpired, Defendants audaciously asserted the only question was "liability" rule damages – as if the loss of Plaintiff's "property" rule right to deny use was legally irrelevant and to be ignored with impunity. This conduct is a classic case for punitive damages.

The jury found Defendants liable on all counts and awarded compensatory damages of $733,878 for both Plaintiffs. Westbound's claims under New York common law entitled it to half the award ($366,939). The jury found Defendants' infringement willful, awarding Bridgeport (the other Plaintiff and music publisher) reduced statutory damages of $150,000, which it later elected.[3]

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[3]Bridgeport elected to take the reduced statutory award for reasons unrelated to any issues raised herein.

Based on the Defendants' conduct – *e.g.*, disregarding Plaintiff's legal right to deny Defendants' use of its materials – the jury found Defendants liable to Westbound for punitive damages. The jury awarded punitive damages against Bad Boy Entertainment for $1.5 million, Bad Boy LLC for $1 million, and UMG Recordings for $1 million.

2. The Court of Appeals' Decision.

The Sixth Circuit rejected the Defendants' claim that the jury verdict was the result of passion or prejudice. 507 F.3d at 478-80. It affirmed that "the harm was the result of [Defendants'] intentional malice or deceit." *Id.* at 486.

The Sixth Circuit conducted a *de novo* review and held that Westbound's $3.5 million punitive damages award was unconstitutionally excessive. The Court considered the *Gore* and *State Farm* "guideposts" for evaluating the constitutionality of a punitive damages award, namely: (1) the reprehensibility of defendants' conduct, (2) the disparity between plaintiff's compensatory and punitive award, and (3) a comparison of the award and civil penalties in comparable cases.

Reprehensibility. Without giving deference to the jury's findings of fact, the Court concluded that only one of the *State Farm* reprehensibility factors was present, *i.e.*, "the harm was the result of intentional malice or deceit." *Id.* At trial Westbound

presented evidence from which the jury was entitled to make the further factual findings that Westbound was a financially vulnerable target and that Defendants' conduct involved repeated actions. However, the Sixth Circuit rejected these two fact-based reprehensibility criteria under *de novo* review. The Court disagreed with the jury on the financial vulnerability of the Plaintiff on factual grounds – without deferring to the jury's finding of fact to the contrary. It further refused to accept that defendants' repeated and audacious violations against Plaintiff constituted repeated conduct. Giving little weight to what the jury might have found regarding financial vulnerability and repeated conduct, the Sixth Circuit made its own factual findings on these issues and found that these factors were absent. Even though the Sixth Circuit preserved the jury finding of willfulness, it diluted the jury's factual finding by characterizing it as "not a strong showing of intentional malice or deceit." *Id.* at 487.

Intentional malice and deceit. The harm to Westbound was the result of intentional malice. The jury so found, the District Judge who heard all evidence concurred, and the Panel affirmed. Pet. App. 27a.

Defendants knew full well of the need to secure approvals for use of "samples." They deliberately used Westbound's sound recording work without notice to Westbound or its approval, hoping Westbound would not discover the breach. In

approving the release of the album at issue, defendants, without authorization, improperly used other samples of other music in other songs on the album. Defendants hid the breach from Westbound from the 1994 release of the infringing album until Plaintiff discovered it in 1998. When the breach was discovered by Westbound, Defendants denied the breach and confrontationally challenged Westbound to prove their claim (even though Defendants knew Westbound's rights had been violated).

Further, Defendants stonewalled Westbound when it sought to hold Defendants accountable, and, provocatively, even mocked Westbound's efforts.

In the litigation itself, Defendants covered up their conduct, repeatedly denying (in response to both interrogatories and requests to admit, as well as in deposition testimony) that the music was taken; yet Defendants confessed in opening statement that they "knew all along" about the unauthorized theft, despite eight years of denial.

In the ultimate contempt for Westbound's rights, Defendants **again** high-handedly released the infringing work multiple times during the lead-up to the trial on infringement, without following their own procedures and without removing the stolen music. This is precisely the kind of in-your-face gall – reprehensible behavior – that warrants punitive damages.

On review, the Sixth Circuit denigrated the degree of reprehensibility of this conduct. Pet. App. 27a-28a. It did not address the standard of its review of this jury fact-finding. In fact, it accorded the jury's determination very little deference. The jury's decision can hardly be declared "clear error," yet the Court gave the jury's finding short shrift, thereby undermining the jury's role in the fact-finding process.

Financial vulnerability. The Sixth Circuit misperceived the nature of the "financial vulnerability" inquiry – a sub-factor of the reprehensibility analysis. The Court observed that Westbound had successfully defended its copyrights in litigation and was therefore not financially vulnerable. 507 F.3d at 487. But that misperceives the purpose (and therefore the nature) of the "financial vulnerability" analysis.

The point here is to determine how reprehensible Defendants' conduct is. That cannot be determined after the fact ("ex post") by a showing that Westbound – David – was indeed able to defend itself (unexpectedly). Rather, the point of reference must be Defendants' perception of Westbound's financial vulnerability when Defendants – Goliath – acted initially (an "ex ante" perspective). In this case, the jury could reasonably conclude – as it did – that Defendants' course of conduct disrespected Westbound's rights because of Defendants' perception that they were Goliath and Plaintiff was David – whereas Jimi Hendrix was a co-equal

Goliath. That Westbound turned out to be a tenacious foe – as did David – is beside the point. The jury could reasonably find reprehensibility under the financial vulnerability factor based on Defendants' behavior their perception of Westbound's ability to detect the violations and protect its rights, and the other evidence offered by Westbound concerning their size and vulnerability. The Sixth Circuit's independent weighing of this factor undervalued the jury's role and misstated the Court's own appellate role in evaluating the jury's finding for clear error.

Further, the Sixth Circuit reasoned that Defendants' refusal to use the Jimi Hendrix sample "cuts both ways-- it could mean that defendants actually tried to avoid copyright infringement, or it could mean... that defendants only avoided infringing copyrights owned by the powerful." Pet. App. 28a. This is a blatant disregard of the jury's factual finding that this evidence cut in favor of Westbound. It is fundamentally inconsistent with *Cooper Industries,* 532 U.S. at 435-36. Under *Cooper Industries* an appellate court cannot set aside such a jury finding unless clearly erroneous. The Sixth Circuit set aside the jury's findings on punitive damages in favor of Westbound without addressing its standard of review, but clearly applying the erroneous *de novo* standard.

Repeated misconduct. Finally, Defendants' conduct was not an "isolated incident" but "repeated." "Repeated misconduct is probative of

reprehensibility when the tortfeasor knows or suspects that his pattern of behavior is unlawful." *CGB Occupational Therapy, Inc. v. RHA Health Servs.*, 499 F.3d 184, 191 (3d Cir. 2007). The repeated conduct started with the intentional misappropriation of Westbound's material and extended over the course of twelve years – leading up to the trial. Whether this type of misappropriation, denial, stonewalling, cover-up, and dissembling – a long-term pattern of intentional and malicious behavior – warrants characterization as "repeated" was within the jury's role to decide. The Court of Appeals ruled otherwise, holding as a matter of law that "[t]he repeated conduct factor" requires that the "similar reprehensible conduct be committed against various different parties." 507 F.3d at 487 (internal cite omitted).

In sum, the Sixth Circuit neglected this Court's emphasis on "gross excessiveness" in its decision. In fact, it did not refer to that or a comparable term even once.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S JUDGMENT CONFLICTS WITH MODERN DUE PROCESS JURISPRUDENCE.

In *Pacific Mutual*, 499 U.S. at 17, this Court held that the "common-law method for assessing punitive damages does not in itself violate due process." At the same time, the Court noted that that "was not the end of the matter." *Id.* at 18. Punitive damage awards were subject to due process scrutiny of procedure and outcome on grounds of reasonableness and fairness. The punitive damage awards that caused concern in *Pacific Mutual* – and led to the modern substantive due process jurisprudence of punitive damage award review -- recognized the Court's "concern about punitive damages that 'run wild.'" *Id.* (emphasis supplied).

From the outset, the Court emphasized that the goal was to achieve a rough and reasonable accommodation between a defendant's "interest in rational decisionmaking" and the state's "interest in meaningful individualized assessment of appropriate deterrence and retribution," *id.* at 20, thereby "ensur[ing] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 22 (emphasis supplied). It was early understood that the very nature of the common-law process of adjudication would lead to inconsistency in jury results, and that

such "nonuniformity cannot be equated with constitutional infirmity." *Id.* at 41 (Kennedy, J., concurring in result). Providing some constraint on jury discretion, guarding against jury bias or prejudice, *id.*, and assuring "some understandable relationship" between punitive and compensatory damages were the guiding objectives that drove this Court's entry into this arena, over the cautionary objections of members of the Court who expressed skepticism about that entry. *Id.* at 24 (Scalia, J., concurring in judgment); *TXO*, 509 U.S. at 470 (Scalia, J., concurring in judgment).

The plurality opinion in *TXO* made "explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable." *Id.* (Scalia, J., concurring in judgment). *TXO* confirmed that the Court's concern was with "grossly excessive" punitive damages awards that were such outliers ("so 'grossly excessive'") as "to violate ... substantive... Due Process." The Court's role under the emerging doctrine was to ensure "reasonableness." *Id.* at 458.

TXO did not command a Court; concurring in the judgment, Justice Kennedy emphasized that the "fundamental guarantee" is not "with dollar amounts" or "ratios," but an assurance "that the individual citizen may rest secure against arbitrary or irrational deprivations of property," which can occur when a punitive damages award "reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence or

retribution." *Id.* at 467. The size of an award is "one indication that it resulted from bias, passion or prejudice," other considerations can also serve as evidence of the lack of rationality and fairness. *Id.* In the face of evidence of TXO's "malice," Justice Kennedy agreed with the plurality that the existence of "deliberate, wrongful conduct" rationally justified a $10 million punitive award in a case involving $19,000 in actual damages. The jury's award could have rationally been "motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice." *Id.* at 469.

The theme of a "concern about punitive damages awards 'run wild'" and the link to concerns about "caprice or passion" are also reflected in Justice O'Connor's dissent in *TXO*. *Id.* at 475. Justice O'Connor was an early proponent of substantive due process review of punitive damages awards; she would have invalidated the award in *TXO* that the Court approved. It was she who complained that the plurality in *TXO* had not set forth "a single guidepost to help other courts find their way through this area." *Id.* at 480. Justice O'Connor proposed a threshold approach: courts should engage in "searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion." *Id.* at 481.[4]

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[4] This approach is much like that embraced by Justice Breyer in his concurrence in *BMW v. Gore*, 517 U.S. at 586-87. Following the plurality approach in *TXO*, 509 U.S. at 457,

In *BMW v. Gore*, 517 U.S. 559 (1996), the Court for the first time struck down a punitive damages award under substantive due process. *Gore* reconfirmed the "grossly excessive" standard: "Only when an award can fairly be categorized as 'grossly excessive' in relation to" a state's interests in "punishing unlawful conduct and deterring its repetition... does it enter the zone of arbitrariness that violates ... Due Process." *Id.* at 568. *Gore* adopted the three now-conventional guideposts that facilitated and structured analysis: reprehensibility, proportionality, and relationship to other analogous penalties. *Id.* at 574-75. These guideposts responded to the concerns that judicial review of jury awards of punitive damages could be too subjective. It is clear that *Gore* was decided not on the basis that the $2 million punitive award was "simply excessive," but on the basis that it was "grossly so, and therefore unconstitutional." *Id.* at 611 (Ginsburg, J., dissenting); *id.* at 586 (Breyer, J., concurring)(The punitive damages award was "'grossly excessive' in relation to legitimate punitive damages objectives").

In post-*Gore* cases, the Court has concentrated on providing more objective criteria to

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Justice Breyer (joined by Justices O'Connor and Souter) contended that if punitive damages procedures are fundamentally fair, there is a "presumption of validity" of a punitive damages award that must be "overcome." In *Gore*, Justice Breyer concluded that the presumption of validity was overcome because, in part, the award was "grossly excessive in light of the State's legitimate punitive damages objectives."

guide review of punitive damages awards -- for example, limiting consideration of conduct outside a state for punishment by a state, *see State Farm*, 538 U.S. at 421; and limiting consideration of harm caused to non-parties, *see Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). It has also held that appellate courts review district courts' determinations of the constitutionality of punitive damages awards on the basis of *de novo* review. Factual findings in the District Court, however, "must be accepted unless clearly erroneous." *Cooper Industries,* 532 U.S. at 435-36 (internal cite omitted). At the same time, the Court has resisted taking cases that deal with the question "whether the award here at issue is 'grossly excessive.'" *Phillip Morris,* 127 S. Ct. at 1063. *See also Exxon Shipping Co. v. Baker*, 07-219 (expressly denying certiorari on issue whether the size of the punitive damages award violated substantive due process).

The substantive due process review of punitive damages awards addresses both "procedures for awarding punitive damages and ... amounts forbidden as 'grossly excessive.'" *Philip Morris*, 127 S. Ct. at 1062. With respect to review of the amount of a punitive award, the Court has "insist[ed] upon proper standards that will cabin the jury's discretionary authority" in order to provide a defendant with "fair notice ... of the severity of the penalty that a State may impose." *Id.* (internal cite omitted). Articulation of guideposts in *Gore* (and further explicated in *State Farm*) adds objectivity, promoting "fair notice" and structuring jury

discretion. Such objective criteria facilitate appellate review, which is designed to "ensure[] that an award of punitive damages is based upon an 'application of law, rather than a decision maker's caprice.'" *State Farm*, 538 U.S. at 418 (internal cites omitted).

A. The Sixth Circuit And Others Are Not Policing Against "Grossly Excessive" Outlier Punitive Damages.

An unforeseen consequence of the development of "guideposts" and their elaboration – importantly, in the name of the rule of law on appellate review – has been a certain routinization of the process of appellate review (as in the instant case). As this case and other cases from the Sixth Circuit and other circuits attest, the routinized appellate review process has led federal appellate courts dangerously close to performing a role that might be proper "[w]ere [they] sitting as state-court judges," reviewing the "size and recurring unpredictability of punitive damages awards," *Pacific Mutual*, 499 U.S. at 42 (Kennedy, J., concurring in judgment), but which strays from the Court's core concern of dealing with outlier cases – "punitive damages that 'run wild.'" *Id.* at 18. That is, the Court's important and commendable strategy of developing guidelines to substitute the rule of law for decision-making by whim and caprice with respect to punitive damages has had an unfortunate byproduct. Federal appellate courts have not kept

their eye on the ball -- policing against "grossly excessive" outlier punitive damages awards. Instead, they have become bogged down in determining (as in this case) whether a single-digit ratio of punitive to compensatory damages should be substituted for a marginally lower single-digit ratio. Thus, the Court of Appeals in this case, as in others, does not even use the term "grossly" excessive, only excessive.

A review of some recent punitive damages cases from the Sixth Circuit, other federal appeals courts, and several state courts, demonstrates a deviation by some appellate courts from this Court's concern with dealing with outlier cases. Rather than serve to protect against "grossly excessive" awards of punitive damages, the *Gore* guideposts have facilitated the routinazation of aggressive appellate review. Some courts (such as the Sixth Circuit herein) have missed the forest for the trees in this important area of jurisprudence – and completely ignored this Court's emphasis on outlier punitive damages. Others have adhered more faithfully to the objectives set out by this Court's evolving jurisprudence.

In one approach, appellate courts (as in this case) have aggressively reduced single-digit punitive award ratios to a marginally smaller single-digit ratio: *See, e.g.*, *Clark v. Chrysler Corp.*, 436 F. 3d 594 (6th Cir. 2006)(punitive damages in product liability case reduced from 6.3 times the compensatory damages award to 2 times

compensatory); *Eden Elec. Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004)(punitive damages in fraud case reduced from 8.5 times compensatory to 4.5 times compensatory); *Conseco v. Finance Servicing Corp.*, 381 F.3d 811 (8th Cir. 2004)(punitive damages in unfair competition case reduced from 5.5 times compensatory to 2 times compensatory); *Diesel Machinery, Inc., v. B. R. Lee Industries*, 418 F.3d 820 (8th Cir. 2005)(punitive damages in dealership termination case reduced from 6.5 times compensatory to 4 times compensatory); *Harris v. Archer*, 134 S.W.3d 411 (Tex. App. 2004)(punitive damages in breach of fiduciary duty case reduced from 7.3 times compensatory to 4 times compensatory); *Tony Gulo Motors v. Chapa*, 2006 WL 3751591 (Tex. 2006)(punitive damages in fraud case reduced from 8.6 times compensatory to 4.3 times compensatory).

At the same time, other appellate courts, more in line with the approach advocated by Petitioner, have appeared to treat single-digit ratios as presumptively valid: *See, e.g., Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) (7:1); *Planned Parenthood v. Am. Coal. of Life Activists*, 422 F.3d 949 (9th Cir. 2005) (9:1); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) (3.3:1); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003) (7:1); *Marie Deonier & Associates v. Paul Revere Life Insurance Co.*, 101 P. 3d 742 (Mont. 2004) (6.6:1); *Union Pacific R.R. Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004) (5.1:1); *Collins*

Entm't Corp. v. Coats & Coats Co., 584 S.E.2d 120 (S.C. App. 2003) (9.9:1).

B. The Sixth Circuit's Decision Reinforces Non-Uniform And Inconsistent Application Of The *Gore* (And *State Farm*) Guideposts.

Federal appeals courts have used the "guideposts" developed in *Gore* (and further explicated in *State Farm*) non-uniformly and, for many such as the Sixth Circuit, in a manner that is inconsistent with the Court's core concern of dealing with outlier cases. Instead of policing against "grossly excessive" outlier punitive damages, those appeals courts have become bogged down in determining, as the Sixth Circuit did in this case, whether a single-digit ratio of punitive to compensatory damages should be substituted for a marginally lower single-digit ratio.

As a consequence, we have the untoward result of a split in circuits regarding the constitutionality of marginally different ratios of punitive to compensatory damage awards. Rather than assist in protecting against "grossly excessive" punitive damages, the Sixth Circuit's approach is an instance of getting bogged down in trivia and routinization of appellate review.

C. The Sixth Circuit Decision Encourages Appellate Micromanagement Of Punitive Damages Awarded By Juries Contrary To This Court's Decision In *Cooper Industries.*

Appellate micromanagement of the punitive damages awarded by juries and affirmed by district courts is facilitated by the rule that appellate review of district court determinations regarding punitive awards is *de novo.* Even though this Court in *Cooper Industries* held that deference on factfinding was appropriate under a clear-error standard, some appellate courts (such as the Sixth Circuit in this case) have not deferred on factfinding but have comprehensively reviewed the record as if they were the jury, acting *de novo.* For example, the Court of Appeals in this case recognized that the jury found defendants' conduct to be willful but, while accepting that judgment, the Court of Appeals devalued it by labeling plaintiff's case as "not a strong showing of intentional malice or deceit." 507 F.3d at 486. Such devaluation of a jury's finding of fact is not the proper role of appellate courts.

In reviewing a jury's award of punitive damages under *State Farm*, the Oregon Court of Appeals rightly noted that a jury's verdict in favor of a party requires that an appellate court resolve all disputed facts in favor of that party. The Oregon Court said:

> "[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and

> that, as a result, we must resolve all disputed facts in favor of plaintiff.... Rather, it states the facts as it wishes the jury had found them, downplays the seriousness of plaintiff's injuries, and reargues a number of issues concerning the dangerousness of its product that the jury decided against it. We ignore those aspects of defendant's arguments." *Waddill v. Anchor Hocking, Inc.*, 190 Ore. App. 172, 178 (Or. Ct. App. 2003).

The court in W*addill* pointed out that *Cooper Industries* did not permit an appeals court to engage in its own evaluation of the factual evidence (except under the clear error standard). *Id.* at 176. The *Waddill court* rightly said: "[*D*]*e novo* review is review for errors of law of the trial court's evaluation of the jury's award for excessiveness; it is **not** *de novo* review of the facts that the jury found that give rise to an award of punitive damages. *Id.* at 177 (emphasis supplied).

In short, in applying the guidepost methodology and the *de novo* standard of review embraced in *Cooper Industries*, some appellate courts, such as the Sixth Circuit, seem to have been led to concentrate on the trees and to lose track of the broader objectives and doctrine. The "strong presumption of validity" of punitive damages awards underscored by the plurality in *TXO*, 509 U.S. at 457, and by Justice Breyer in his *Gore* concurrence, is nowhere in sight in those jurisdictions. The consideration of damages "run wild" is not on the

radar of many courts of appeals, including the Sixth Circuit, which did not use the term "grossly" excessive at all in its analysis in this case – only the far milder and disapproved "excessive" terminology.

But if the common-law process for adjudicating punitive damages awards is to be retained, as *Pacific Mutual* holds, then some degree of nonuniformity is inevitable. If courts, acting on *de novo* review, are free to overturn jury verdicts that, to them, seem excessive, then the initial objectives of judicial intervention will have become adulterated. Reasonableness, fairness, and proportionality have been the goals of punitive damages review; only "grossly excessive" outliers are barred by substantive due process. But that was not the analysis in this case, and that has not been the analysis adopted by a number of appellate courts.

D. Circuits And State Courts Split On Repeated Conduct Element Of Reprehensibility.

The Sixth Circuit's decision warrants review for a final reason relating to the meaning of one of the reprehensibility factors, repeated conduct. The Sixth Circuit followed circuit precedent in holding that a defendant cannot qualify as a "repeated wrongdoer" under the guidepost unless the acts in question were committed against different parties, other than the plaintiff. 507 F.3d at 487. The lower courts are divided on the question.

The Sixth Circuit held that Westbound had not satisfied the "repeated conduct" element of the reprehensibility criteria, because it had not offered proof of conduct by Defendants against third parties. That decision conflicts with what other federal and state courts have accepted as "repeated conduct."

The Second Circuit has agreed with the Sixth Circuit. *See Lee v. Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (citing need for evidence of repeated misconduct with respect to other employees rather than repeated misconduct against the plaintiff). Other appellate courts have held, contrary to the Sixth and Second Circuit, that repeated conduct may include conduct directed against the same plaintiff: *See, e.g., CGB Occupational Therapy, Inc. v. RHA Health Servs.*, 499 F.3d 184, 191 (3d Cir. 2007) ("repeated conduct" against the same plaintiff "relevant" in measuring the reprehensibility of the defendant's conduct); *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1010 (9th Cir. 2005)(conduct toward same plaintiff, including improper litigation tactics against same plaintiff, could establish reprehensibility); *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 219 S.W.3d 643 (Ark. Ct. App. 2005) (a course of conduct involving the same plaintiff could satisfy the "repeated wrongdoing" test); *Century Surety Co. v. Polisso*, 43 Cal. Rptr. 3d 468, 499-500 (Cal. Ct. App. 2006) (repeated conduct against the same plaintiffs satisfied reprehensibility criteria); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 447 (Kan. 2006)(defendant's conduct was reprehensible

because it "was not an isolated incident," even though all the evidence referred to the single natural gas well involving plaintiff).

This Court should grant review to address the divergent approaches by the lower courts. The Sixth Circuit's decision has created precisely the constitutional risk that the Court condemned in *State Farm* and *Philip Morris* - namely, that juries and trial courts might use punitive damages to punish a defendant for wrongdoing against absent parties rather than against the plaintiff. *See* 538 U.S. at 422-23; 127 S. Ct. at 1062. Conversely, when the repeated acts are all directed at the plaintiff in a common course of conduct before the court, the acts necessarily share a joint focus, and the defendant has ample ability to obtain relevant evidence and mount a defense. The repeated conduct inquiry should be deemed jury factfinding subject to clear error review on appeal.

II. ADDITIONAL STRUCTURE IS NEEDED TO ASSURE CONSISTENCY IN DUE PROCESS JURISPRUDENCE.

This Court should take this case to continue its approach of providing additional structure to assure that only the "grossly excessive" punitive awards are invalidated. There are a number of ways that this should be done.

- The Court should embrace as binding doctrine the framework of the plurality in *TXO*, 509 U.S. at 457, and of Justice Breyer's concurrence in *Gore,* 517 U.S. at 586-87, by expressly noting that a jury award of punitive damages in a ratio of compensatory-to-punitive-damages of less than 10:1 carries a presumption of validity, absent a finding of passion or prejudice on the part of the jury or lack of malice on the part of the tortfeasor. This would suggest a threshold analytical approach in which the centrality of malice and jury "bias, caprice or passion" would be reinforced. The threshold presumption would not attach when either (i) malice by the tortfeasor is absent, *cf.* TXO, 509 U.S. at 468-69 (Kennedy, J., concurring in judgment), or (ii) passion or prejudice by the jury is present. In the absence of a "verdict [that] discloses such great disproportions as to suggest the possibility of bias, caprice, or passion," TXO, 509 U.S. at 481 (O'Connor, J., dissenting), other evidence of jury bias, passion or prejudice would be required to nullify the presumption of validity. *State Farm* strongly suggests that a punitive-to-compensatory-damage ratio of 10:1 or more would suffice to nullify any presumption of validity as it supports an inference of bias, passion, or prejudice *Cf. Pacific Mutual,* 499 U.S. at 41 (Kennedy, J., concurring in judgment)("A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage

inflicted can be some evidence of bias or prejudice in an appropriate case").

- In *Cooper Industries*, this Court analogized the punitive damages proportionality doctrine to the proportionality doctrine of the Eighth Amendment. Only "grossly excessive" penalties are constitutional violations. 532 U.S. at 433-35. The *Cooper Industries* Court relied on *United States v. Bajakajian*, 525 U.S. 321 (1998), an excessive fines case, to hold that appellate review of punitive damages determinations by District Courts is *de novo*. By similar analogy, this Court should expressly adopt the distinction drawn in *Bajakajian* between strict and gross proportionality, which the Court in *Cooper Industries* strongly suggested. 532 U.S. at 434 (noting that cases such as *Bajakajian* adopted a standard that invalidated punishments that were "grossly disproportional to the gravity of ... defendant[s'] offenses"). The Court in *State Farm* signaled that a single-digit ratio of punitive to compensatory damages might be an outer bound of permissible punitive awards, although not a mathematically determinative rule. But a result of the *State Farm* language has been a deemphasis on the overall standard itself – "gross" excessiveness of punitive awards. The "gross excessiveness" standard needs reinforcement by express embrace of a "gross" proportionalilty requirement, not a "strict" proportionality requirement. *Bajakajian*, 525 U.S. at 336. *See also Harmelin v. Michigan*, 501

U.S. 957, 997, 1001 (1991)(Kennedy, J., concurring in judgment) (recognizing in Eighth Amendment context the requirement of "narrow proportionality," which rejects "greatly disproportioned" sentences, but not a requirement for "strict proportionality between crime and sentence"); *Ewing v. California*, 538 U.S. 11, 20-24 (2003)(plurality)(*semble*).

- Guidelines are needed for clarifying and shaping the role of appellate courts in applying the *Cooper Industries de novo* review standard. *Cooper Industries* held that courts of appeals should apply a "*de novo*" standard of review "when passing on district courts' determinations of the constitutionality of punitive damages awards." 532 U.S. at 436. Two components of *Cooper Industries* need emphasis to assure the appropriate role of appellate courts.

    - First, district court factual findings "must be accepted unless clearly erroneous." *Id.* at 435. In this case, the Court of Appeals found that Petitioner "is not a financially vulnerable victim," without any reference to the jury's findings. 507 F.3d at 487. The Court of Appeals second-guessed the jury regarding what inference to draw from Defendants' failure to secure approval to use Westbound's sound recording when Defendants had declined to use copyrighted materials from a prominent songwriter whose estate had denied

permission for use. The Court of Appeals also rejected the inference that Defendants' conduct was "repeated," by concluding that such conduct could not be repeated when directed at one Plaintiff, even over many years and a multitude of incidents. And, while accepting the jury's finding that "defendants acted willfully," *id.* at 486, the Court of Appeals denigrated this conclusion by stating that there was "not a strong showing of intentional malice or deceit." The strength of such a showing is a finding of fact – something that is within the purview of the jury to determine. Only the legal significance of such a showing is subject to *de novo* review under *Cooper Industries*. Jury findings regarding factual components of the reprehensibility guidepost should be given deference under the "clear error" standard, not reviewed under the "*de novo*" review standard.

- Second, *Cooper Industries* does not alter the substantive standard – a requirement that, to violate due process, a punitive award must be "grossly" excessive, not just "excessive." *De novo* appellate review is not a license to overturn jury punitive damages awards because an appellate court would decide the matter differently upon consideration of the guideposts. It is only where the jury award is so excessive that it undermines the principle of "fair

> warning" to a defendant or the principle of "gross" proportionality that appellate intervention is warranted. *De novo* review allows an appellate court to review a district court's determination anew, but it does not permit an appellate court to serve as a junior varsity jury – unless that jury's verdict is "run wild" and is so excessive as to strongly suggest bias, passion, or prejudice. In this case, defendants expressly claimed that the jury verdict was the result of passion and prejudice, but the district court and the court of appeals both rejected that claim.

This case provides a good vehicle for the Court to review and clarify the role of appellate courts in reviewing punitive damages claims.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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